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CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF:

INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/39

Addendum

Report on the mission to Guatemala

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Executive summary

The present report concerns a follow-up mission to Guatemala undertaken from 10 to 12 May 2001 by the Special Rapporteur on the independence of judges and lawyers.

The Special Rapporteur undertook an earlier fact finding-mission to Guatemala from 16 to 29 August 1999, following which he submitted a report (E/CN.4/2000/61/Add.1) containing detailed conclusions and recommendations. The follow-up mission was undertaken at the request of the Government and non-governmental organizations to evaluate the extent to which the Government had implemented the recommendations of the Special Rapporteur contained in his earlier report.

During the 2001 mission, the Special Rapporteur met with government officials, members of the Constitutional Court, of the Supreme Court and of the Council of the Judicial Career. He also met with members of the Association of Judges, of the Bar Association and of the National Commission for Monitoring and Supporting the Strengthening of Justice. In addition, he met with representatives of international organizations, international donors and non-governmental organizations and with private individuals.

In view of the nature of the mission and of its time constraints, the Special Rapporteur limited his visit to Guatemala City.

The Special Rapporteur's 1999 mission

Following his 1999 mission, the Special Rapporteur expressed his concern, inter alia about the high level of impunity for human rights crimes and the widespread threats against and harassment and intimidation of judges, and made specific recommendations in that regard. In order to professionalize the judiciary, he recommended a series of reforms of the administration of justice. He also made recommendations to enhance the access to justice of the indigenous Maya community, improve juvenile justice and abolish discrimination against women. The prevalence of the crime of lynching was also of great concern to the Special Rapporteur.

Conclusions after the 2001 visit

In the present report, the Special Rapporteur notes that many of his recommendations have not been implemented. One of the reasons for this is the lack of an integrated approach, involving all the actors in the administration of justice. The progress that has been made has been piecemeal and isolated. Of the Special Rapporteur's specific recommendations addressed to the Government of Guatemala, 4 have been fully implemented and 15 are in the process of being implemented or have been partially implemented; 10 of the recommendations have not been implemented at all.

The progress that has been made mainly concerns the professionalization of the judiciary. The Special Rapporteur welcomes the implementation of the Law on the Judicial Career, the establishment of the Council of the Judicial Career and, in particular, the new training

programme for candidate judges and the new disciplinary procedures and the adoption of a code of ethics for judges. The Special Rapporteur, while welcoming the efforts made by the Supreme Court and the Council of the Judicial Career to strengthen the process of evaluation of judges, regrets that positive measures have not been undertaken to amend the Constitution to provide for adequate security of tenure for judges and thus for meaningful judicial independence.

The Special Rapporteur regrets that no concerted effort has been made to reduce the number of lynchings and notes that the few projects with the aim of familiarizing the public with the justice system hardly suffice in view of the seriousness of the phenomenon.

The Special Rapporteur regrets that rather than declining, harassment and threats to justice operators have actually increased. He welcomes, however, the positive steps taken by the Supreme Court and the Bar Association, as well as the creation of the special prosecutor's office in this regard. He is concerned about recent reports that the Supreme Court's budget for the protection of judges has been reduced.

With regard to impunity, the Special Rapporteur notes with appreciation the conclusion of the trial at first instance relating to the murder of Monsignor Gerardi. Nevertheless, impunity is still widespread. The continued delay in the trial of those accused of the murder of Ms. Myrna Mack Chang is a source of grave concern. The Special Rapporteur has urged the lawyers acting for the accused persons in that trial to be mindful of their duty to justice.

The Special Rapporteur regrets that despite some legal aid programmes and interpretation services, access to justice for the indigenous community has not improved. He also regrets that no progress has been made in studying the possibility of incorporating traditional laws and practices of the Maya in the mainstream legal system.

The Special Rapporteur notes with regret that the Children and Adolescents Code has still not been implemented and that the situation of children vis-à-vis access to justice has not improved. He expresses serious concerns over allegations that the delay in implementation is due to the influence of those involved in the child adoption industry over highly-placed government officials, including some in the Congress.

The increased harassment and intimidation of journalists and the media is a matter of concern. The Special Rapporteur has notified his colleague, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of his concerns, and is pleased to note that, at the invitation of the Government, the latter Special Rapporteur will be undertaking a mission to Guatemala in June/July 2002.

The Special Rapporteur welcomes the re-establishment of the OHCHR office in Guatemala as of 19 November 2001.

Recommendations

The Special Rapporteur reiterates all the recommendations he made in his earlier report and calls upon the Government to make a serious effort to implement them in their entirety. In particular, the Special Rapporteur reiterates and recommends:

(a) With regard to impunity:

All those who are known to have committed human rights violations during the armed conflict should be removed from public office and from the military, and should not be elected, appointed or recruited to any public office.

All outstanding cases of human rights violations must be investigated and the perpetrators brought to justice. In particular, the trial of the persons accused of the murder of Myrna Mack Chang, which has been pending since 1990, and the pending appeals against the decision of the trial court in the Gerardi murder case must be expedited.

The courts should inquire into any refusal of the army to cooperate in the production of records on the grounds of national security, in order to ascertain whether a genuine State security interest is involved.

The armed forces should not be involved in the role of combating crime in society. The law adopted by Congress to this end should be repealed and the armed forces sent back to their barracks.

(b) With regard to lynching:

Concerted efforts must be made by the Ministry of the Interior and the Office of the Attorney-General to investigate and prosecute the perpetrators of these violent crimes.

Competent government authorities as well as local community leaders must be heard publicly denouncing the criminal acts of lynching.

Public educational campaign against self-help summary justice should be intensified.

(c) With regard to threats against and harassment and intimidation of justice operators:

The budget allocation for the protection of judges, lawyers and prosecutors must be increased. In this regard the special prosecutor entrusted with the task of investigating attacks on justice operators must be provided with adequate resources.

Security personnel provided by both the police and the Supreme Court for the protection of judges and prosecutors must be adequately trained and paid.

All judges should be provided with life insurance policies and such policies should include the risk of personal accidents.

The media should exercise a balance between their freedom to report on the justice system and the need to protect the independence of the judiciary; "trial by newspapers" should be avoided.

Decree No. 90/96 relating to Protection of Witnesses, etc., must be implemented.

(d) With regard to training, security of tenure, disciplinary procedures for judges:

The process of reform must be continued speedily; the Government should continue to increase its budgetary allocations to realize all reforms.

Senior judges should be encouraged to deliver lectures at training courses for judges.

The provision of the services of qualified interpreters in all courts, particularly in courts to which the indigenous communities have access, is imperative and must be given high priority to avoid allegations of miscarriage of justice.

As soon as possible the Constitution should be amended to ensure adequate security of tenure for judges, to provide meaningful judicial independence. Until then the process of evaluating the performance of judges for renewal of their appointments should be transparent, to avoid allegations of unfairness. Similarly, the disciplinary process for judges must be transparent to avoid allegations of unfairness.

All judges, particularly those of the Constitutional Court and the Supreme Court, must be sensitized to the primacy of human rights treaties and agreements ratified by Guatemala over domestic law, pursuant to article 40 of the Constitution. With regard to the imposition of the death penalty, attention should be drawn to article 4 of the American Convention on Human Rights. Where, at the time of ratification of the American Convention, the death sentence was not provided under municipal law as a penalty for a crime, it should not thereafter be legislated as a penalty for any crime.

(e) With regard to the indigenous community, the Government must consider measures to integrate the customary laws and practices of the Mayan community and other indigenous groups into mainstream law, so long as they are not inconsistent with international treaties on human rights ratified by Guatemala.

(f) With regard to the status of women, the positive legislative measures taken should be intensified: all gender-based discriminatory provisions in the various laws and codes should be identified and repealed.

(g) With regard to children:

The Children and Adolescents Code (Decree 78/96) should be implemented without delay. In the meantime, as the Convention on the Rights of the Child has primacy over the current Minors Code, the Convention should be applied as far as it is possible.

The Government should take measures to discourage the clandestine trafficking of children for adoption. Those involved in such undertakings who attempt to influence members of the Congress to stifle implementation of the Code must be exposed and action taken against them.

Introduction

1. The present report concerns a mission to Guatemala undertaken from 10 to 12 May 2001 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in Commission on Human Rights resolution 1994/41, as renewed by resolutions 1997/23 and 2000/42 extending the mandate for a further three years. The mandate inter alia calls upon the Special Rapporteur to inquire into any substantial allegations transmitted to him and report his conclusions and recommendations thereon.

2. The Special Rapporteur undertook an earlier fact-finding mission to Guatemala from 16 to 29 August 1999, after having received complaints concerning threats against and intimidation and harassment of lawyers, judges and prosecutors, weakening the rule of law and the independence of the judiciary. The Special Rapporteur had also received allegations of widespread impunity for human rights violations. Following that mission, the Special Rapporteur submitted a report (E/CN.4/2000/61/Add.1), which contained detailed conclusions and recommendations.

3. During the fifty-seventh session of the Commission on Human Rights, held in Geneva from 19 March to 27 April 2001, the Special Rapporteur met with representatives of the Government of Guatemala, Guatemalan non-governmental organizations and the United Nations Development Programme (UNDP) office in Guatemala. They all invited the Special Rapporteur to undertake a follow-up mission to Guatemala in order to verify the extent of implementation of his recommendations. By letter dated 23 April 2001, the Government officially invited the Special Rapporteur. The UNDP office in Guatemala undertook to pay all the expenses related to the mission, for which the Special Rapporteur expresses his gratitude.

4. In the course of the mission, the Special Rapporteur met with the President of the Congress of the Republic of Guatemala, General Efraín Ríos Montt; the Vice-President of the Republic, Juan F. Reyes López; the Minister of the Interior, Byron Humberto Barrientos Diaz; the Prosecutor-General, Adolfo Gonzáles Rodas; the President of the Constitutional Court, Rodolfo Rohrmoser, and magistrates of the Constitutional Court; the President of the Supreme Court, Hugo Leonel Maúl, and magistrates of the Supreme Court; members of the Council of the Judicial Career; members of the Association of Judges; the President and members of the Bar Association; members of the National Commission for Monitoring and Supporting the Strengthening of Justice; and the former President of the Constitutional Court, Conchita Mazariegos.

5. The Special Rapporteur met with representatives of the Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA), the United Nations Children's Fund (UNICEF) and UNDP, and with representatives of international donors.

6. The Special Rapporteur also met with representatives of non-governmental organizations dealing with issues related to his mandate, as well as with media editors. In addition, he met with members of the Association of Research and Social Studies (ASIES). He visited the Rafael Landívar University, where he met with professors and students from the Master's Programme in Human Rights.

7. In view of the nature of the mission and of its time constraints, the Special Rapporteur limited his visit to Guatemala City.

I. GENERAL BACKGROUND

8. During his visit to Guatemala in 1999, the Special Rapporteur noted that the justice system had been devastated during the armed conflict which had terrorized the country. The civil war had been brought to an end only in late 1996 with the signing of the Peace Accords. Three years later, the Special Rapporteur concluded that the justice system had not recovered and was still marginalized. The Special Rapporteur also expressed his great concern regarding the high level of impunity for human rights crimes.

9. The Special Rapporteur found that there were widespread threats against and harassment and intimidation of judges, and that the Government and the Supreme Court had failed to provide the requisite protection. In this respect, the Special Rapporteur recommended inter alia that the Supreme Court and the Office of the Prosecutor-General should set up a joint committee and formulate a procedure for the handling of complaints which would enable timely action to be taken to provide protection. The Special Rapporteur also requested that all judges should be provided with life insurance policies and that Decree No. 90/96 relating to the Protection of Witnesses should be implemented.

10. With regard to the widespread impunity and the failure to investigate adequately a large number of murders and human rights related crimes, the Special Rapporteur recommended that all those who were known to have committed human rights violations during the armed conflict should be removed from public office and from the military. Moreover, an international team of independent investigators should be entrusted with studying the investigations carried out so far into high-profile crimes where there are serious allegations of military or political pressure.

11. The Special Rapporteur considered that articles 208 and 215 of the Constitution, which provide that judges are appointed for a fixed term of five years with the possibility of re-election, did not provide the requisite security of tenure and might be inconsistent with the principle of judicial independence. The Special Rapporteur therefore recommended that those articles should be amended.

12. The Special Rapporteur also recommended a series of reforms be undertaken of the administration of justice, in particular:

Implementation of the laws on the judicial career and on the judicial civil service, as well as the plan for modernizing the judiciary, approved by the Supreme Court;

The drafting of a code of judicial ethics;

Increasing budgetary allocations to finance reforms;

Entrusting the Ad Hoc Commission for the Judiciary with coordinating international aid and domestic funds;

Undertaking a comprehensive inquiry into legal education to standardize and upgrade the teaching of law in the universities;

Undertaking an inquiry into the structure and organization of the legal profession and formulating a code of ethics for lawyers;

Setting up a permanent commission, in cooperation between the Government, the Supreme Court, the Office of the Attorney-General, the academic community and the legal profession, in order to revise laws and propose legal reform;

Providing court libraries with updated legal materials;

Providing the Office of the Attorney-General with adequate financial and human resources and modern equipment, in order to improve skills, competence and efficiency, and to draft a code of conduct for public prosecutors;

Making continuing legal education for judges, lawyers and prosecutors compulsory;

Considering a State-run legal aid scheme in addition to the Office of the Public Defender;

Providing the services of qualified interpreters in all courts;

Providing adequate resources to the Office of the Public Defender.

13. The Special Rapporteur found that the disciplinary process applicable to judges did not comply with the standards provided in the Basic Principles on the Independence of the Judiciary. He also recommended that several individual cases should be reviewed.

14. The Special Rapporteur also recommended that an independent agency should be established, with powers to investigate complaints of corruption in public office, including in the judiciary, and that those found to have committed the crime of corruption should be prosecuted.

15. The Special Rapporteur recommended the continued presence of MINUGUA and the OHCHR office in Guatemala.

16. The Special Rapporteur found that the indigenous Maya community was severely affected by the inadequacy of the justice system, especially lack of access to courts and of adequate legal representation and interpretation services. The Special Rapporteur recommended that a study be undertaken to integrate customary laws and practices of the indigenous community into the mainstream law, without violating internationally recognized principles of due process.

17. With regard to children, the Special Rapporteur was most concerned over juvenile justice. He recommended that the Children and Adolescents Code (Decree 78/96), approved by Congress in 1996, should be implemented without delay and that the Government should attend to the welfare of street children.

18. The Special Rapporteur also recommended that a study should be undertaken to identify gender-based discriminatory provisions in the Criminal Procedure Code and the Labour Code in order to have them repealed by Congress. He further recommended that sexual harassment in the workplace should be defined as a crime.

19. The prevalence of the crime of lynching was of great concern to the Special Rapporteur. He considered that one of the causes of this crime could be lack of confidence in and frustration with the justice system, which was unable to meet the expectations of the people. The Special Rapporteur recommended that concerted efforts should be made by the Ministry of the Interior and the Office of the Prosecutor-General to investigate these crimes and prosecute the perpetrators, and that an extensive campaign should be undertaken to educate the public against self-help summary justice.

20. The Special Rapporteur noted that the media played a pivotal role in the education of the people in the values of constitutional and transparent government, the rule of law and the significance of an independent justice system and encouraged them in this respect.

II. LEGAL AND POLITICAL DEVELOPMENTS SINCE THE SPECIAL RAPPORTEUR'S VISIT IN 1999

21. In January 2000, a new Government under President Alfonso Portillo of the FRG came to power in Guatemala. President Portillo promised full implementation of the Peace Accords, and pledged support for an independent administration of justice. The FRG being the majority political party in the Congress, General Rios Montt, of that party, became President of the Congress. Progress in carrying out the Government's reform agenda, however, has been slow. From information received during his visit, the Special Rapporteur concluded that this was partly because of serious differences of opinion within the governing FRG party.

22. In 1998, the National Commission for Monitoring and Supporting the Strengthening of Justice (CNSAFJ) had been created in order to follow up on the recommendations made by the Commission on the Strengthening of Justice. By government resolution No. 310-200, the composition of the Commission was amended[1] and its objectives and functions were enlarged so as also to monitor and support the recommendations made by the Special Rapporteur. In 2000, the Law on the Judicial Career was implemented and the Judicial Council was established.

23. During 2000, the Government signed several agreements with the Inter-American Commission on Human Rights, in which it recognized government responsibility for cases of human rights violations which were pending before that Commission. In the agreements, the Government undertook to provide compensation to victims or their survivors, to investigate the crimes and to prosecute those responsible.[2]

24. In approving the budget for 2001, the Congress reduced the budget of the Constitutional Court by 50 per cent.[3] There have been suggestions that the reason behind this was the dissatisfaction of the Congress with the judgements of the Constitutional Court, in particular the judgement lifting the immunity of 23 members of the Congress in the so-called Guategate case (see below, paragraph 35). In a judgement of 5 April 2001, the Constitutional Court, however, declared the budget cut unconstitutional and its budget was subsequently fixed at the same

amount as the previous year. At the time of completion of this report, the Special Rapporteur has learnt that the constitutional budget allocation for the judiciary for the year 2002 has been reduced considerably. The judiciary sought the sum of 491 million quetzales but was only allocated 361 million quetzales.

25. In general, many interlocutors expressed concern that Guatemala was facing a deterioration in the democratic process that might endanger the recent achievements. In this context, the Special Rapporteur's attention was drawn to an increase in attacks against social organizations, which, according to some, show a pattern indicating the involvement of powerful clandestine forces. This pattern weakens the institutional order, obstructs fulfilment of the peace accords and generally blocks the transformation towards democracy.

26. Guatemala continues to receive substantial international financial aid. The Special Rapporteur was informed that in August 2000 the National Commission for Monitoring and Supporting the Strengthening of Justice signed a memorandum of understanding with the United States Agency for International Development to undertake various activities to strengthen the judiciary. It also entered into an agreement with UNDP to develop programmes for the strengthening of the rule of law. Many other development agencies also provide assistance.

III. ISSUES EXAMINED BY THE SPECIAL RAPPORTEUR DURING HIS FOLLOW-UP VISIT

A. Impunity

27. The Special Rapporteur was greatly concerned to find that the level of impunity for killings and serious human rights violations had not decreased. He was informed that, especially in politically sensitive cases where the military or politicians were involved, prosecutors and judges often were so intimidated that they refrained from taking appropriate action. For instance, it was alleged that in the Guategate case (see below, paragraph 35), the prosecutor accepted to withdraw the charges against the President of the Congress despite the fact that his signature was on the document modifying the Liquor Tax Act adopted by the Congress.

28. According to information received, witnesses of crimes are often so intimidated that they refuse to give evidence. It was also reported that journalists are regularly intimidated and threatened if they publish investigative articles regarding corruption or the involvement of State officials in human rights violations.

29. The Special Rapporteur was informed that many persons associated with past human rights violations of a serious nature had been appointed to public office by the President of the Republic. In this context, it was mentioned that the current Minister of the Interior, Major Byron Barrientos, has been accused of being responsible for many human rights violations in his past function of military intelligence officer. At the time of completion of this report, the Special Rapporteur has learnt that Major Byron Barrientos had tendered his resignation following allegations of misappropriation of funds. One of the advisers to the President, General Ortega Menaldo, acted as Chief of Staff of former President Serrano Elías and was said to have been involved in human rights violations during that period. It was also brought to the Special Rapporteur's attention that the President of the Congress, General Efraín Ríos Montt, is

under judicial investigation for genocide since charges against him were filed in May 2001 by the National Association of Victims. At the time of writing the present report, the prosecutor in charge of the case was in the process of hearing witnesses.

30. The Special Rapporteur was informed that the ruling in the Xamán case, criticized by MINUGUA and referred to in his previous report,[4] had been annulled on 12 April 2000 by the Supreme Court and a new trial ordered. Concerns were expressed that this may lead to the accused being acquitted, because in the course of time evidence has been tampered with and some of it has been lost. In May 2000, the case was referred to the first instance tribunal of Cobán, which had already been in charge of the first trial. However, three amparo appeals (inter alia challenging the competence of the tribunal of Cobán) are still pending decision; at the time of writing, the trial had still not started and only 4 of the 15 accused who were previously acquitted had been rearrested.

31. The Special Rapporteur learned that the Constitutional Court, on 4 April 2001, had upheld an appeal in amparo against a court order for the arrest and detention of several persons accused of the massacre of villagers in the community of Dos Erres in 1982. The Constitutional Court decided that the court should have examined the defendants' request under article 11 of the Law of National Reconciliation, to determine whether or not the crime would be excluded from criminal responsibility pursuant to the Law of National Reconciliation. Concerns were expressed that this judgement may lead to impunity for serious violations of the right to life. At the time of writing, the case was still pending determination.

32. At the time of completion of this report, the three military officers accused of being the intellectual authors of the murder of Ms. Myrna Mack Chang on 11 September 1990,[5] had still not been tried. The Special Rapporteur received allegations of irregularities in the proceedings, in particular the slow handling of interim appeals filed by the defence, the abusive nature of many of these appeals and the losing of evidence in the custody of the court.

33. The Gerardi case[6] was being tried during the Special Rapporteur's visit. On 8 June 2001, the tribunal delivered its verdict and found four of the accused, three military officers and a priest, guilty of conspiracy for murder. The tribunal found that the murder was committed for political reasons, and with the knowledge of the command of the Estado Mayor Presidencial (EMP). It therefore ordered the opening of a criminal case against several high-ranking military officers in the EMP at that time. MINUGUA reported that one of the judges received threats after the judgement was delivered.

34. Concerns were expressed about parallel investigations conducted by government bodies not legally authorized to do so, or by clandestine structures, in cases of human rights violations in which responsibility is attributed to government officials. During his follow-up mission, the case of the murder of Edgar Alfredo Ordóñez Porta was brought to the Special Rapporteur's attention. Mr. Porta disappeared on 3 May 1999 and was found dead on 6 May 1999. His brother, the journalist Hugo Ordóñez Porta, has publicly recounted how the military unlawfully conducted the investigation to cover up their own involvement, and how they fabricated a case against two innocent persons who were later acquitted by the court, which acknowledged that the investigation had been unlawful since it had not been carried out by the Public Ministry. No independent investigations into the murder have been carried out. The Special Rapporteur

agrees with the Committee against Torture that these parallel investigations jeopardize the autonomy and independence of the judiciary and the Public Prosecutor's Office, and hamper and defeat the purpose of investigations of these crimes.[7]

35. The Special Rapporteur was informed that in the Guategate case, which led to the lifting of the immunity of over 24 members of Congress for having made changes in the legislation after it had been adopted by the Congress, the members being charged were not suspended from their congressional functions, contrary to article 161 of the Constitution. The Special Rapporteur also received other allegations of irregularities, in particular to the effect that the lawyer representing General Montt (against whom charges were dropped at a first preliminary hearing) was a substitute judge in the Constitutional Court and as such may have unduly influenced the investigating judge. The Special Rapporteur also received complaints that civil organizations were denied the right to participate as a private plaintiff, on the ground that no violations of human rights or abuses of authority had occurred in this case. According to the allegations, this would show that the investigating judge was not impartial. Since the Special Rapporteur's visit, the case against the parliamentarians has been closed for lack of evidence.

36. The Minister of the Interior informed the Special Rapporteur that over the past year, seven police chiefs and 700 policemen had been dismissed for failing to fulfil their duties. The Danish Centre for Human Rights is financing programmes for training policemen.

37. The Prosecutor General informed the Special Rapporteur that a special prosecutor's office against corruption had been created on 28 December 1999 in order to investigate and prosecute acts of corruption committed by civil servants. The Special Prosecutor is assisted by 4 prosecutors and 13 assistant prosecutors. In 2000, the office was apprised of 1,319 cases, of which 1,276 were still under investigation at the end of the year. Only three of the cases investigated led to charges being formulated.

38. With regard to investigations in cases of murder, the Prosecutor General informed the Special Rapporteur that delays are caused by the fact that both the prosecutor's office and the judiciary have their own forensic experts, a relic from the past inquisitorial system. The Special Rapporteur was told that the prosecutor's forensic experts collect the evidence at the scene of the crime, whereas the judiciary's experts perform the autopsies. Even though it is the Special Rapporteur's understanding that the judiciary's experts do not come under the supervision of the judiciary, but are merely paid out of its budget, the Special Rapporteur feels that the procedure may conflict with the principle of impartiality of the judiciary. Other factors leading to impunity for crime are the lack of manpower and the lack of cooperation between the Public Ministry and the National Civil Police.

39. The Special Rapporteur was informed that in many cases when the judge requests information from the army, the army invokes article 30 of the Constitution to justify not providing information in the interest of national security. Judges are said not to take any action when the army refuses to cooperate, although they would have the possibility to do so.

40. Faced with a public outcry over the general level of unpunished crime, in June 2000, Congress adopted a law authorizing military participation in crime-combating activities. The law is said to be a temporary measure, but its application is not limited in time. Although the

Special Rapporteur appreciates the seriousness of the situation, he shares the concern expressed by the Inter-American Commission on Human Rights that it is not the role of the armed forces to combat crime, and that the concept of national security should not be confused with that of public security.[8] The Special Rapporteur notes, moreover, that because of the recent civil war a fear of the army persists within the population, and in particular among the indigenous community, and that involving the army in police tasks may further weaken the population's confidence in the administration of justice.

41. Connected with impunity is the fact that many people have no access to justice owing to insufficient resources.

42. At the time of completion of this report, the Special Rapporteur learnt that in the course of the investigations into the escape of 78 prisoners from the Escuintla Maximum Security Prison on 17 June 2001, the first instance judge Escuintla has been removed from her judicial functions. The removal follows charges of corruption for facilitating the escape by ordering the transfer of the prisoners to a section of the prison from where it was easier to escape.

B. Lynchings

43. The Special Rapporteur was greatly concerned to find that lynchings continued. He was informed that most lynchings occurred out of frustration with the justice system. It was also suggested that much of this violence has its origin in the past armed conflict. In this connection, the Special Rapporteur notes that the level of violence in general is also increasing. The President of the Supreme Court suggested that the culture of violence promoted by the civil war was still permeating society, especially in the inland and remote areas, where violent groups who disagree with a decision of a judge may act against him. Some judges fear that a judgement might provoke a violent reaction on the part of such groups and to this extent the independence of the judiciary is affected. In the opinion of the President of the Supreme Court, this type of violent action against judges is caused by ignorance on the part of the public about the justice system. The Supreme Court, with the support of MINUGUA, is actively involved in the organization of education campaigns through the radio, printed materials and workshops to address the incidence of lynchings with a view to preventing them.

44. MINUGUA reported that it had found that in many lynchings the lead is taken by persons who belong to the community security organizations created during the civil war. Most of the lynchings take place in departments where the armed conflict was most intense. It has been suggested that one of the reasons for this is that the traditional social structure has been destroyed during the civil war and replaced with a militarized social model. MINUGUA reported that it had found no indications linking the lynchings with indigenous customary law or practices, as has been suggested by some. According to MINUGUA verifications, the justice system has been able to solve only 2.3 per cent of all lynching cases.[9]

45. The Special Rapporteur was informed at the time of his visit that there were 21 cases of lynchings before the courts. He was told that these cases are difficult to investigate, because people are afraid and there is little cooperation. After the mission, the Special Rapporteur

learned that a first instance court had acquitted three persons accused of the lynching of a Japanese tourist and a Guatemalan bus driver at a market in Todos Santos Cuchumatán, Huehuetenango, in April 2000.

46. On 13 March 2001, Mr. Hugo Alvaro Martínez Pérez, justice of the peace in Senahú, was lynched by a mob, after they managed to break into the courthouse through the roof. The Special Rapporteur was told that there was evidence that this attack had been carefully planned. The immediate cause for the lynching appears to be the discontent of the population over a decision by the judge to acquit a truck driver who had been accused of harming a child. The judge found that the child had been hurt by a rope falling off the truck, and concluded that it had been an accident. People were incited over the radio to come to the courthouse. First, the people immobilized the policemen who were on duty and took their weapons. They also cut telephone lines. All night they attacked the courthouse with stones. Police reinforcements sent were not able to enter the town because they were met by a group of 800 people, who disarmed them. Only at 7 a.m. were reinforcements sent by air, but they arrived too late. The Special Rapporteur met with the special prosecutor in charge of the investigation into the lynching and received a detailed account of the status of the investigation. He was informed that three suspects had been detained and that warrants for the arrest of 12 others had been requested. It has been suggested that the lynching of the judge was the culmination of a political campaign to have him removed from office, ostensibly because he was not of the same culture and ethnicity as the population. According to some reports, the judge had received death threats, which he had reported to the Supreme Court. The registrar informed the Special Rapporteur, however, that at his meeting with the Supreme Court, he had not been aware of any previous death threat against the justice of the peace. Since his return from mission, the Special Rapporteur communicated with the Government concerning allegations he received that the son and daughter-in-law of the late justice of the peace had received death threats in order to make them desist from probing further into the case. The Special Rapporteur requested the Government to take appropriate protection measures.

C. Harassment, intimidation, threats and attacks against justice operators

47. The Supreme Court reported that it had recorded 33 cases of threats against judges during 2000 (of which 22 were against justices of the peace) and 24 in 2001 as of the time of the Special Rapporteur's visit. According to the Supreme Court, most threats came from accused persons on trial or their supporters or family. The Supreme Court has established a committee to study the matter and to make recommendations and suggest specific action. Judges and magistrates at all levels are represented on this committee. The Supreme Court informed the Special Rapporteur that, when a judge received threats, he would inform the registrar of the Supreme Court and the Supreme Court would then ask the security forces to provide support. Subsequently, an investigation of the threats would be initiated. After the Special Rapporteur's mission, on 24 October 2001, the new president of the Supreme Court, Carlos Álvarez-Lobos Villatoro, announced that the courts had records of 60 judges who were being threatened. Unfortunately, budget constraints had led the Court to cut the measures for the protection of the judges, according to the president, including the leasing contract for security cars for the judges who heard the Gerardi case at first instance.

48. In his meeting with the Association of Judges, the Special Rapporteur was told that judges form 40 per cent of all justice operators threatened. The Special Rapporteur was given a list of 10 recent cases where judges had been victims of violence or threats of violence. The judges expressed concern about social and psychological pressure through the mass media. They expressed their feeling that this intimidation was directed not only against their personal integrity but also against the integrity of the judiciary as a whole and against the emerging democracy. They strongly voiced their opinion that threats against judges were a direct attack on judicial independence. The judges also expressed their concerns about the low level of training of the security guards provided by the police or the Supreme Court. Moreover, often the judges incur expenses since they have to provide food and transportation for the security guards assigned. The judges told the Special Rapporteur that they still had no life insurance policies, nor were they covered by medical insurance other than the public health system. On 21 March 2001, the Supreme Court had adopted a decree establishing a payment of Q150,000 in the event of a judge's death as a consequence of violent acts related to the exercise of his/her functions. In the same decree it established a payment for medical expenses of up to Q150,000 in cases where medical treatment was necessary as a result of violent acts related to the judge's exercise of his/her functions.

49. The Special Rapporteur's attention was also drawn to the precarious situation of many justices of the peace, who are posted in remote areas with little means of communication, and little or no protection, as illustrated by the lynching of the justice of the peace in Senahú (see above, paragraph 46). These judges often work 365 days a year without a holiday since there is no one to replace them. Often the judges cannot take their families with them to the place where they work, but they themselves have to live in the municipality where they are posted. They are marginalized even within the judiciary and are often subject to threats and intimidation against which they have no protection.

50. The Special Rapporteur was informed that Mr. Orlando Bardales Paiz, justice of the peace in Nenton, Huehuetenango, had been receiving threats and intimidation from persons involved in drug trafficking, including members of the national civil police. Upon request of the judge, the Council on the Judicial Career was considering his transfer. His family was moved out of the area on 14 March 2001.

51. One of the most high-profile trials during the Special Rapporteur's visit was that of five persons accused of the murder of Monsignor Gerardi in 1998. During the mission, the Special Rapporteur met with the three judges hearing the Gerardi case, who had been subjected to threats and intimidation. One of the judges, Yasmin Barrios, told him how her house had been attacked with grenades, after an action to recuse her had been rejected by the court. Since then, she had been provided with security guards. The president of the tribunal, Eduardo Cojulún, recounted how he had been receiving telephone threats and that he was afraid to travel to remote areas. The third judge, Amanda Guzman, stated that she had been given two security guards, but that she was still afraid. All three stressed that security should be increased at the last phase of the trial and even after sentence.

52. After the judgement in the Gerardi trial was delivered on 8 June 2001, the Special Rapporteur received information that the threats against judges and prosecutors continued. It was also reported that threats were made against the judges who were going to hear the case on appeal. On 30 July 2001, the main prosecutor in the Gerardi case, Mr. Leopoldo Zeissig, resigned from his post, citing continuing threats, and left Guatemala with his family.

53. On 23 March 2001, the then president of the Constitutional Court, Conchita Mazariegos, was threatened and shots were fired at her house two days after the Court had decided an appeal relating to the effects of the lifting of the immunity of 22 members of the Congress, including its President, for their involvement in the Guategate scandal.

54. On 7 February 2001, a special prosecutor's office was created to investigate attacks and threats against justice operators. During his meeting with the special prosecutor, the Special Rapporteur was informed that the mandate of the office stretched back to six months before its creation. The special prosecutor is assisted by three assistant prosecutors, two officials and one driver. At the time of the Special Rapporteur's visit, the office was investigating 40 cases. Twenty of these cases related to lawyers and five to prosecutors. If the office receives a report of a threat against a lawyer, it asks the police to provide protection. In the case of judges, it is the Supreme Court that asks the police to provide protection. The special prosecutor expressed concern about the safety of his officers, who often have to travel to remote places to conduct investigations in a hostile environment.

55. The Bar Association of Guatemala expressed its concern about the increased violence against lawyers. The Special Rapporteur was informed that between October 2000 and February 2001 seven lawyers had been killed. One of them was killed despite the fact that he had been given a security guard because of threats received earlier. According to information received from the special prosecutor for threats and attacks against judges, lawyers and prosecutors, four of these killings were related to the lawyers' professional activities and were probably carried out by hired killers. The other three were linked to private troubles. No arrests of suspected killers had been made at the time of the Special Rapporteur's visit.

56. The Special Rapporteur was informed that prosecutors also receive threats when dealing with sensitive cases. For instance, the prosecutor who withdrew the charges against General Montt in the Guategate case said that he had since received death threats. The special prosecutor investigating attacks against justice operators has been reported to have received death threats, as has the special prosecutor investigating corruption in the Promotor and Metropolitano banks. Prosecutors dealing with special cases (drugs and organized crime cases, the Gerardi case, etc.) are given permanent security. All prosecutors have life insurance for more than Q75,000.

57. According to information provided by the Minister of the Interior, the Ministry has serious budget problems resulting in scarcity of equipment and personnel so that it cannot provide the requisite security in all cases. In this context, the Special Rapporteur notes that in Guatemala there is one policeman per 2,403 citizens.

D. Training, security of tenure, disciplinary procedures for judges

58. The Special Rapporteur was informed that, on 31 October 2000, the Constitutional Court had delivered a judgement declaring unconstitutional a death sentence which had been imposed in violation of the American Convention on Human Rights. The Special Rapporteur welcomed this judgement as an indication that the Guatemalan judiciary was becoming increasingly aware of international standards and willing to apply them. However, after his mission the Special Rapporteur learnt that on 28 June 2001 the Constitutional Court delivered another judgement in an amparo application upholding the death sentence imposed for the crime of kidnapping without causing death. The second judgement was alleged to be inconsistent with the earlier judgement.

59. During the mission, the President of the Constitutional Court expressed his concern that many judges were not sufficiently sensitized to constitutional and international human rights norms. The Constitutional Court was contemplating seminars and workshops for judges to sensitize them to these matters. The Constitutional Court was committed to developing a culture of information on human rights and the rule of law. It was convinced that better training and better salaries would improve the quality of the judiciary.

60. The Special Rapporteur was informed that the Law on Judicial Career had been enacted and was operational, that the selection of judges was now transparent and that there was a due process for disciplining judges and evaluating them. Aspiring judges now received intensive training for six months; the first hundred newly trained judges had come out of judicial training school in April 2001. He was also informed that human rights training for judges was being developed with aid from Finland.

61. In the initial training programme the subjects are: basic penal law, basic civil law, procedural law, labour law, minors law, constitutional law and multicultural attitudes. It was stressed that because of the low level of university education, the judicial school has to compensate for lacunae in knowledge. Students are admitted through competitive examinations. For the final training course, only 100 out of 800 applicants were accepted. The Special Rapporteur heard criticism of the training programme, because of the lack of a clear profile for candidate judges and the fact that the knowledge and skills of the candidates were tested through a multiple choice examination only. Training courses for justices of the peace are being developed as well as courses for forensic medical doctors and assistants to judges. The judiciary has entered into an agreement with the Rafael Landivar University, which provides additional courses for judges and magistrates. Internship programmes for law students are also being developed. With the aid of the Spanish Agency for International Cooperation, the judiciary also organizes a summer school, in cooperation with the San Carlos and Rafael Landivar universities, with courses for judges, prosecutors and public defenders.

62. With regard to university education, the Special Rapporteur notes that there appears to be a misunderstanding with regard to article 207 of the Constitution, which was invoked by several interlocutors, among whom were members of the Council for the Judicial Career, as an impediment to judges' teaching at university. The Special Rapporteur wishes to stress that, in his opinion, this article does not prevent senior judges and magistrates from giving occasional lectures at university voluntarily and without remuneration. The Special Rapporteur welcomed

the information that both the Rafael Landívar University and the San Carlos University have reviewed their law curriculum and are now providing post-graduate courses in human rights. The San Carlos University also provides a master's programme on indigenous rights and inter-culturality.

63. The Coordinating Instance for the Modernization of the Justice Sector (ICMSJ), on which the judiciary, the Prosecutor General, the Institute for Public Defence and the Ministry of the Interior are represented, continues developing projects, with the help of, inter alia, the Interamerican Development Bank, UNDP and USAID. Among its projects are the establishment of integrated justice centres, the integration of computer systems, training programmes, and the development of common policies with regard to crime control.

64. Under the Law on the Judicial Career, all judges whose constitutional five-year term comes to an end are subject to a performance evaluation by the Council of the Judicial Career. The Special Rapporteur was informed that the Supreme Court had sought an amendment to the Constitution to abolish the five-year term and make the tenure of judges compatible with the principle of security of tenure, which is crucial for securing judicial independence. In the meantime, the Supreme Court felt that the evaluation process was the best guarantee of the independence of judges. In this connection, the Special Rapporteur was informed that if a judge's performance was satisfactory, there was an obligation to reappoint him for a further five years.

65. The Council of the Judicial Career took office in July 2000. The President of the Supreme Court is also the President of the Council. Among its functions are: (i) to manage the selection procedure for judges and their initial training; (ii) to administer the procedures for disciplining judges and court functionaries; (iii) to evaluate judges' performance. The Council explained that the norms for evaluation are clear and explained to all judges. Aspects taken into account are: the judge's training record (15 per cent), disciplinary record (20 per cent), evaluation by lawyers, prosecutors and public defenders (30 per cent), number and quality of judgements (25 per cent) and evaluation by the judge's assistants (10 per cent). In the opinion of the Council, the continuous evaluation guarantees judicial quality. It is also used to recommend transfers and scholarships.

66. Under the Law on the Judicial Career, the Board of Judicial Discipline hears and determines disciplinary complaints against judges and magistrates. It is composed of two magistrates and one judge. Since its establishment on 21 August 2000, it received 724 cases until the end of December 2000, and 120 in 2001 up to 26 March. Of these, 481 complaints were rejected without a hearing, 71 hearings were held and another 56 hearings were scheduled.

67. The members of the Association of Judges expressed their dissatisfaction with the evaluation procedure under the Law on the Judicial Career. They questioned the objectivity of the evaluation and demanded transparency. The non-renewal of 18 judges by the Supreme Court (see below, paragraph 69) was cited as an example of political decisions and has led to distrust in the new system. The judges also expressed concern about the abuse of the disciplinary proceedings by the public prosecutor, who often files a disciplinary complaint against a judge when he is not satisfied with the judge's decision, instead of challenging the judge's decision through an appeal to a higher court.

68. In the case of the justice of the peace, Efrain Mogollón, who had been dismissed in July 1998 after what the Special Rapporteur had found to be an undue process,[10] the Special Rapporteur was informed that on 14 December 1999, the Supreme Court had rejected Efrain Mogollón's petition to review his case. No settlement had been reached and on 2 August 2000 Mr. Mogollón had presented his case to the Inter-American Commission on Human Rights.

69. The Special Rapporteur received information that the appointments of 18 judges of first instance were not renewed in 2000, without any evaluation. The President of the Supreme Court explained that the Supreme Court had taken the decision not to renew the appointments because the judges had stayed on beyond the five-year period established by the Constitution and before the Law on the Judicial Career entered into force. According to the President of the Supreme Court, in those circumstances, the Supreme Court had no constitutional obligation to continue their employment. On appeal, however, the Constitutional Court ordered that the judges should be evaluated in accordance with the new law. After his mission, the Special Rapporteur was informed that the Council of the Judicial Career had evaluated the judges, but that none of them passed the test and they were thus not reinstated.

E. Code of ethics

70. In March 2001, the Supreme Court adopted a Code of Judicial Ethics, which had been prepared by magistrate Edgardo Daniel Barreda in consultation with judges and magistrates. In preparation of the Code, a workshop was held on ethical values in the justice system. Workshops were being organized to familiarize members of the judiciary with its contents.

71. The Special Rapporteur was also informed that a Code of Professional Ethics for the legal profession has been in existence since 1994. Moreover, the Bar Association has its own norms and provides for the possibility of sanctions imposed by its Honours' Court. The implementation of the Code and the disciplinary procedures, however, was said to be weak.

72. The Prosecutor General informed the Special Rapporteur that he had appointed a commission to elaborate a draft code of ethics for public prosecutors, and asked the Special Rapporteur for his cooperation. The Special Rapporteur was also informed that progress had been made with the training of prosecutors and that primary attention was given to the fight against corruption, efficiency and public relations. Experienced prosecutors were being used to train less experienced ones. A newly revised handbook for public prosecutors was published, which includes the relevant norms and procedures to be followed by the prosecutor.

73. The Minister of the Interior informed the Special Rapporteur that he was preparing a draft code of ethics for the police and requested the Special Rapporteur's contribution.

F. Public defenders

74. The Special Rapporteur was informed that the Institute of Public Penal Defence, with the assistance of the Inter-American Development Bank, has organized legal aid schemes, additional to the system of public defenders, through which practising lawyers provide legal defence based

on a fixed payment per case. Some 300 lawyers, 140 of them in Guatemala City, participate in the schemes. The Institute also organizes continuous education and has established legal libraries for the use of public defenders. At present, 325 public defenders are permanently employed by the Institute.

G. The indigenous community

75. The Special Rapporteur was informed that Defensoría Maya had 18 offices and each office was dealing with about 200 cases a month, totalling 43,200 cases in 2000. The cases may range from civil disputes to criminal defence and are dealt with either within the Maya traditional legal system or before the courts. Other indigenous defence organizations undertake similar activities. The Institute for Public Penal Defence covers four linguistic regions with lawyers who speak the local language, as well as interpreters. Nevertheless, many indigenous persons are still being tried before the courts without a proper defence or without being able to follow the hearing for lack of an interpreter.

76. Defensoría Maya also organizes workshops on the Mayan legal system and the official legal system and their (in)compatibility. No progress appears to have been made in studying the possibility of recognizing the Maya traditional legal system and of incorporating it in the mainstream legal system.

77. The Special Rapporteur learned that the Rafael Landívar University offers a special course in legal interpretation in the major Mayan languages and that so far 277 persons have graduated. They have found work in courts, NGOs and institutions. Some of them have continued their studies and are now obtaining law degrees.

H. Children

78. The Special Rapporteur was informed that the Children and Adolescents Code, adopted by the Congress in 1996 in order to comply with Guatemala's obligations under the Convention on the Rights of the Child[11], had still not been made law. The Special Rapporteur received information indicating that the law was not enacted owing to pressure from the child adoption industry on the one hand[12], and, on the other, from traditional groups, who perceive the Code as interfering with traditional family life. When asked, the President of the Congress, General Efraín Ríos Montt, denied knowledge of the existence of any child adoption industry. The Vice-President of the Republic, however, said he could not deny the existence of such an industry. The formal reasons advanced by the Government for not implementing the law are the budgetary implications of the provision of juvenile courts in the country, the impossibility of applying the law fully without a transitional period and the fact that partial entry into force could not be accepted. Since it considers that it is unconstitutional for the executive not to enact a law which has been approved by the Congress, Casa Alianza filed an action before the Constitutional Court in January 2001. At the time of writing the present report this action was still pending. While visiting the Congress, the Special Rapporteur was informed that it is now discussing possible amendments to the Minors' Code as a replacement for the Children and Adolescents Code. Concerns were expressed that these amendments would fall short of rendering the legislation compatible with the Convention on the Rights of the Child.

79. In the absence of legislation concerning minors that complies with Guatemala's obligations under the Convention on the Rights of the Child and with its own Constitution, justice operators have adopted diverse practices. Some judges, prosecutors and defence lawyers apply directly the provisions of the Convention in accordance with the Constitution, since the Convention has primacy. Others continue to apply the norms of the Minors' Code, although it conflicts with the Constitution and the Convention.

80. The Special Rapporteur was informed about long delays in the hearing of cases concerning children, partly caused by the lack of first instance courts for minors. Due to the lack of a specific provision in the Minors' Code, children continue to appear before the judge without legal representation. Crimes against children, including trafficking in children, are not being properly investigated and go unpunished. The Special Rapporteur received information that the complicity of certain lawyers and judges with government agencies leads to improper child adoption practices.

I. Status of women

81. The Special Rapporteur has noted the observation of the Human Rights Committee that positive legal measures on behalf of women had been adopted and that various bodies for the promotion and protection of women's rights had been created.[13] However, he remains concerned over discriminatory provisions in legislation.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

82. The Special Rapporteur welcomes the creation of the National Commission for Monitoring and Supporting the Strengthening of Justice, with a mandate, among other things, to advise on the implementation of his recommendations. However, the Special Rapporteur notes that many of his recommendations have not been implemented. One of the reasons for this is the lack of an integrated approach involving all actors in the administration of justice. The progress that has been made has been piecemeal and isolated. Of the specific recommendations the Special Rapporteur addressed to the Government of Guatemala following his mission in 1999 4 have been fully implemented[14] and 15 are in the process of being implemented or have been partially implemented[15]; 10 of the recommendations have not been implemented at all.[16]

83. The progress that has been made is mainly in the professionalization of the judiciary. The Special Rapporteur welcomes the implementation of the Law on the Judicial Career, the establishment of the Council of the Judicial Career and in particular the new training programme for candidate judges, the new procedures for disciplinary action and the adoption of a code of ethics for judges. With regard to the security of tenure of judges, the Special Rapporteur regrets that the political reality in Guatemala has not allowed an amendment to the Constitution in order to abolish the five-year term of office currently applicable. The Special Rapporteur welcomes the efforts made by the Supreme Court and the Council of the Judicial Career to strengthen the procedure for evaluating of judges in order to make prolongation of their terms mandatory if the evaluation is satisfactory, but he notes that many judges still fear that arbitrary decisions might be taken.

84. The reduction of the constitutional budget allocation for the year 2002 is a matter of grave concern, particularly at a time when financial resources are needed to expedite the reform process.

85. The Special Rapporteur regrets that no concerted effort has been made to reduce the number of lynchings. He has noted some projects, mainly within the judiciary, aimed at familiarizing the public with the justice system. However, this hardly suffices in view of the seriousness of the phenomenon. In this context, the Special Rapporteur has noted that, in many places, law enforcement officials do not speak or understand the local language. It is not surprising, therefore, that there are often misunderstandings with the local population.

86. Harassment and threats to justice operators continue to be of serious concern. The Special Rapporteur regrets that rather than declining, these incidents have actually increased. While they may reflect the strengthening of the justice system, the increase should be arrested before such incidents begin once again to severely threaten judicial independence. The Special Rapporteur welcomes the active approach taken by both the Supreme Court and the Bar Association in this regard and commends them for their vigilance. The Special Rapporteur also welcomes the creation of the Special Prosecutor's Office. He is concerned about recent reports that the Supreme Court's budget for the protection of judges has been reduced.

87. With regard to impunity, the Special Rapporteur notes with appreciation the conclusion of the trial at first instance relating to the murder of Monsignor Gerardi. Nevertheless, impunity is still widespread. The continued delay in the trial of those accused of the murder of Ms. Myrna Mack Chang is a source of grave concern. The lawyers acting for the accused must remember that they too have a duty to justice and should not be seen to be abusing the judicial process to delay or stifle the progress of the trial.

88. The Special Rapporteur regrets that despite several programmes providing legal aid and interpretation services, access to justice for the indigenous community remains seriously defective. He also regrets that no progress has been made in studying the possibility of incorporating the traditional laws and practices of the Maya in the mainstream legal system.

89. The Special Rapporteur notes with regret that the Children and Adolescents Code has still not been implemented and that the situation of children vis-à-vis access to justice has not improved. He is also seriously concerned about the information he received according to which the delay in implementation is due to the influence of the child adoption industry, which is said to benefit from the acquiescence of some highly placed government officials.

90. The increased harassment and intimidation of journalists and the media is a matter of concern. The Special Rapporteur has notified his colleague the Special Rapporteur on freedom of opinion and expression of his concerns, and is pleased to note that, at the invitation of the Government, the latter Special Rapporteur will be undertaking a mission to Guatemala in June/July 2002.

91. The Special Rapporteur welcomes the re-establishment of the OHCHR office in Guatemela as of 19 November 2001.

B. Recommendations

92. The Special Rapporteur reiterates all the recommendations he made in his earlier report and calls upon the Government to make a serious effort to implement them in their entirety. In particular, the Special Rapporteur reiterates the following recommendations after taking into consideration developments since his earlier report:

(a) With regard to impunity:

(i) All those who are known to have committed human rights violations during the armed conflict should be removed from public office and from the military. Those with such a record should not be elected, appointed or recruited for any public office. Candidates for State elections should be asked to declare under oath that they have not previously committed any crimes, including human rights violations during the armed conflict;

(ii) All outstanding cases of human rights violations must be investigated and the perpetrators brought to justice. In particular, the trial of the persons accused of Myrna Mack Chang's murder must be expedited. The investigations and prosecution have been outstanding since 1990. Lawyers acting for the accused must examine their consciences and have due regard to their duty to justice, not abuse the process of the court and stifle due process of law;

(iii) The pending appeals from the decision of the trial court in the Gerardi murder case must be expedited;

(iv) The courts should not take lightly, without further inquiry, the refusal of the army to cooperate in the production of records on grounds of national security. Each refusal must be inquired into to ascertain whether there is a genuine State security interest involved;

(v) The armed forces should not be involved in the role of combating crime in society. The law adopted by the Congress to this end should be repealed and the armed forces sent back to their barracks;

(b) With regard to lynching:

(i) Concerted efforts must be continued by the Ministry of the Interior and the Office of the Attorney-General to investigate and prosecute the perpetrators of these violent crimes;

(ii) Competent government authorities must be heard publicly denouncing the criminal acts of lynching. Similarly, local community leaders must be called upon to denounce these acts in their communities;

(iii) Public educational programmes against self-help summary justice should be intensified. These programmes should include dissemination of information on judicial reforms to allay suspicion of the justice system.

(c) With regard to threats, harassment and intimidation of justice operators:

(i) The budgetary allocation for the protection of judges, lawyers and prosecutors must be increased. In this regard, the special prosecutor entrusted with the task of investigating attacks on justice operators must be provided with adequate resources;

(ii) Security personnel provided by both the police and the Supreme Court for the protection of judges and prosecutors must be adequately trained and paid;

(iii) All judges should be provided with life insurance policies and such policies should include the risk of personal accidents;

(iv) The media should exercise a balance between its freedom to report on the justice system and the need to protect the independence of the judiciary; "trial by newspapers" should be avoided;

(v) Decree No. 90/96 relating to Protection of Witnesses, etc., must be implemented;

(d) With regard to training, security of tenure and disciplinary procedures for judges:

(i) The reform process must be continued speedily; the Government should continue to increase its budgetary allocations to realize all the reforms;

(ii) Senior judges should be encouraged to deliver lectures at training courses for judges;

(iii) The provision of qualified interpretation services in all courts, particularly in courts to which the indigenous communities have access, is imperative and must be given high priority to avoid allegations of miscarriages of justice;

(iv) As soon as possible the Constitution should be amended to provide for adequate security of tenure for judges, in order to ensure meaningful judicial independence. Until then, the performance evaluation process for consideration of the renewal of the appointments of judges should be transparent to avoid allegations of unfairness. Similarly, the disciplinary process for judges must be transparent to avoid allegations of unfairness. Judges should not be removed arbitrarily. Pending investigations of complaints they may be suspended from their judicial functions but they should not be dismissed without being accorded due process of law, as set out in paragraphs 17 to 20 of the Basic Principles on the Independence of the Judiciary;

(v) All judges particularly those in the Constitutional Court and the Supreme Court must be sensitized to the primacy of human rights treaties and agreements ratified by Guatemala over domestic law pursuant to article 40 of the Constitution. With regard to the imposition of the death penalty attention should be drawn to Article 4 of the American Convention on Human Rights "Pact of San Jose, Costa Rica". Where at the time of ratification of the American Convention the death sentence was not provided under municipal law as a penalty for a crime it should not thereafter be legislated as a penalty for any crime;

(e) With regard to the indigenous community the Government must consider measures to integrate the customary laws and practices of the Mayan community and other indigenous groups into the mainstream law so long as they are not inconsistent with international treaties on human rights ratified by Guatemala;

(f) With regard to the status of women, the positive legislative measures taken should be intensified to identify all gender-based discriminatory provisions in the various legislation and codes and such provisions should be repealed;

(g) With regard to children:

(i) The Children and Adolescents Code (Decree 78/96) should be implemented without delay. In the meantime, as the Convention on the Rights of the Child has primacy over the Minors' Code, the Convention should be applied as far as it is possible;

(ii) The Government should take measures to discourage the clandestine trafficking of children for adoption. Those involved in such business who attempt to influence members of the Congress to stifle implementation of Decree 78/96 must be exposed and action taken against them.

Notes

[1] The Commission now consists of 13 members: (a) two judges appointed by the Supreme Court of Justice from among its members; (b) the Attorney-General of the Republic or a very high-level official appointed by him; (c) the Chairman of the Presidential Commission for Coordinating Executive Policy in the Field of Human Rights (COPREDEH) or, in his absence, the Executive Director of the Commission; (d) the Director of the Institute of the Public Defence System or a very high-level official appointed by him; (e) a very high-level representative of the Ministry of the Interior appointed by the Minister; (f) the Director-General of the national Civilian Police; (g) the Chairman of the Governing Board of the Bar Association of Guatemala; (h) the deans of the law faculties of the Universities of San Carlos and Rafael Landívar; (i) in their personal capacity, Helen Beatriz Mack Chang, Rosalina Tuyuc Velásquez and Arnoldo Ortiz Moscoso.

[2] The Government also accepted the Inter-American Commission's conclusions and recommendations in several cases of which the examination had been finalized. See Inter-American Commission on Human Rights, Fifth Report on the Situation of Human Rights in Guatemala, April 2001, chap. II, paras. 6-13.

[3] According to the law, the Constitutional Court receives 5 per cent of the budget for the judiciary (which receives a minimum of 2 per cent of the total budget). When approving the budget for 2001, Congress divided the judicial budget into "constitutional support" and "extraordinary support", and then accorded to the Constitutional Court 5 per cent of the "constitutional support" only, thereby effectively cutting the Constitutional Court's budget in half compared to the previous budget.

[4] See E/CN.4/2000/61/Add.1, para. 50.

[5] Ibid., para. 55.

[6] Ibid., para. 57.

[7] See conclusions and recommendations adopted by the Committee against Torture in November 2000 regarding Guatemala, A/56/44, paras. 67-76.

[8] Inter-American Commission on Human Rights, Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111, doc. 21, Rev., of 6 April 2001, chap. I, para. 53.

[9] See MINUGUA, Informe de Verificación, Los Linchamientos: un Flagelo contra la Dignidad humana, December 2000.

[10] See E/CN.4/2000/61/Add.1, para. 66.

[11] Ibid, para. 129.

[12] See also the report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas-Santos, on her mission to Guatemala, E/CN.4/2000/73/Add.2, paras. 20-23.

[13] See concluding observations of the Human Rights Committee: Guatemala, 27 August 2001, CCPR/CO/72/GTM, para. 6.

[14] Recommendations (d) (i), (ii), (vii) and (e) (i) (E/CN.4/2000/61/Add.1, para. 169).

[15] Recommendations (a) (i), (ii); (c); (d) (iv), (v), (viii), (ix) (x), (xi), (xiii), (xiv); (f); (i) (ii); (j) and (k) (ii) (E/CN.4/2000/61/Add.1, para. 169).

[16] Recommendations (a) (iii); (b) (i), (ii); (d) (iii), (vi), (xii); (e) (ii); (h); (i) (i); (k) (i) (E/CN.4/2000/61/Add.1, para. 169).

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